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Herlin Karnell, S.E.M.

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Opinion

Denmark and the European Area of Freedom, Security and Justice: A Scandinavian Arrangement

Ester Herlin-Karnell

Introduction

The famous Danish writer Karen Blixen once described in her story *Babette's feast*, how the most amazing meal was served but none of Babette's guests realised the price of the dinner with all its imported continental, luxurious, gourmet food and drinks, until Babette tells them: it is a life's savings.¹ Highly shocked by the unexpected expenses of the dinner the guests tell her she will stay poor for the rest of her life whereby Babette replies: 'An artist is never poor.' Denmark seems to have a different relationship to the EU imported project: it is too costly and not worth its price, particularly with regard to the Area of Freedom, Security and Justice (AFSJ). EU justice and home affair cooperation is simply not deemed tasty enough as it encompasses too many half-baked dishes.

While there have been many studies of the British and Irish opt out/opt in (pick and choose)² approach to the EU project, Denmark and the Protocol no. 22 as attached to the Lisbon Treaty seem to have been largely excluded from this debate on multi-speed Europe with regard to crime, anti-terrorism, security and immigration law. But for anyone taking the bridge from Malmö to Copenhagen or otherwise having seen the Swedish/Danish TV crime drama *The Bridge*, the prospect of not having Denmark in the AFSJ should cause serious headaches. Malmö might be lawless at times but Copenhagen is becoming a 'fortress Scandinavia'.

This reflection paper proceeds in three stages. The first section looks at the AFSJ, explains what it is and why it could potentially be transformed from an ugly duckling into a swan. This part of the paper starts from the presumption that the AFSJ is currently going through a highly-needed transformation in the direction of increased legitimacy in terms of the extended jurisdiction of the Court of Justice and extended competences to legislate on judicial safeguards. So while the project is still characterised by its work-in-progress nature, the institutional framework is slowly improving. Thereafter, the paper looks at the rules governing differentiation by

* VU Centre for European Legal Studies and Faculty of Law. Email: e.herlinkarnell@vu.nl

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¹ I Dinesen [Karen Blixen] *Anecdotes of Destiny*, (1958), London: Penguin, 2001.

² See e.g. S. Peers, *EU Justice and Home Affairs*, Oxford: Oxford University Press 2011; A. Hinarejos, J. Spencer and S. Peers, 'Opting out of criminal law: what is actually involved?' Centre for European Law Cambridge working paper 2012-1; E. Fahey, 'A Jagged-Edged Jigsaw: the Boundaries of Constitutional Differentiation and Irish-British-euro Relations after the Treaty of Lisbon', in L. Rubini & M. Trybus, *The Treaty of Lisbon and the Future of European Law and Policy*, Cheltenham: Edward Elgar 2012, ch. 7.

assessing the EU's flexibility mechanisms. It will do so first by looking at the meaning of the notion of flexibility as such. Secondly it aims to discuss what protocol no. 22 means for Denmark and the rest of the EU and to what extent this situation differs from the UK and Irish opt-outs. Moreover, the paper briefly assesses the transitional protocol no. 36 which expires in 2014 and which will 'Lisbonise' all the remaining third pillar instruments that are currently still in place despite the entry into force of the Lisbon Treaty, thereby completing the full removal of the pillars. Finally, the paper looks at the Nordic criminal law cooperation template and asks to what extent, and how, it differs from the European model.

I. The AFSJ: An Ugly Duckling Project

The AFSJ is one of the fastest-expanding EU policy areas at present. As such it is a very broadly defined field of law governing a wide EU policy area ranging from security issues and criminal law to border control and civil law cooperation. The AFSJ, previously called Justice and Home Affairs, entered the EU scene in connection with the coming into force of the Maastricht Treaty in 1993. With the Amsterdam Treaty of 1999 the EU's objectives with regard to the fight against crime were clarified; this created the concept of an AFSJ. While asylum matters, immigration and civil law cooperation were moved to the former EC Treaty title IV, criminal law cooperation and security remained the hallmark of the third pillar regime under Amsterdam.³ However, the third pillar allowed for a limited involvement by the European Parliament in the legislative process and could easily be criticised for having created a democratic deficit and for a lack of transparency in law-making. Moreover, the Court of Justice's jurisdiction within the third pillar was very restricted and based on a voluntary declaration by the Member States to confer such jurisdiction (ex Article 35, Treaty of the European Union).⁴ Therefore, from an EU law perspective, the former third pillar framework was never considered to be an ideal counterpart to the first pillar (EC) sphere.⁵ Shortly after the entry into force of the Treaty of Amsterdam, the consequential Tampere Council of 1999 and the subsequent Hague programme⁶ took the notion of an AFSJ space one step further by introducing the adoption of the internal market formula of 'mutual recognition' into the third pillar. This concept has remained the main driver for development although there has also been extensive legislation in the area, particularly in the fields of terrorism, organised crime and illicit drug trafficking, in accordance with the relevant provisions. In addition to the Treaty changes, there have been a number of important EU council programmes in this area, from the abovementioned Tampere conclusions in 1999 to the Stockholm programme currently in force until 2014.⁷

So, as noted, while asylum, immigration and civil law matters fell within the scope of the former EC Treaty, criminal law was kept in the third pillar. Yet title IV EC (asylum, immigration and civil law cooperation) remained intergovernmental to

³ See Peers 2012, *supra* note 2, for an extensive overview of the history of the third pillar, ch. 1.

⁴ For a comment, *ibid.*, ch. 2.

⁵ S. Lavenex, 'Justice and Home Affairs' in H. Wallace et al. (eds), *Policy-Making in the European Union*, Oxford: Oxford University Press 2010, ch 19.

⁶ 1999 European Council Tampere and 'The Hague Programme: Strengthening Freedom, Security and Justice in the EU', OJ C53/1 (2005).

⁷ 2009 The Stockholm programme — An open and secure Europe serving and protecting the citizen, Council of the European Union, OJ C 115/1 (2010).

some extent (developed with the Hague programme in 2004) in the sense that the ordinary legislative procedure (qualified majority voting) applied, except when it came to legal migration and family law, which remained subject to unanimity in council and consultation of the European Parliament.⁸ In addition, the Court was subject to a distinct regime also under the first pillar asylum and immigration regime, as its jurisdiction did not go as far as mainstream EC law due to the fact that the court was only empowered to receive references from the highest courts in the Member States.⁹

For this reason the Court of Justice's full jurisdiction remained curtailed until the entry into force of the Lisbon Treaty (with the exception of the Transitional Protocol no. 36 which expires in 2014). Therefore, the Lisbon Treaty constitutes a major – and much needed – development in the sense that it gives the Court full jurisdictional control of the entire AFSJ. This raises challenges, of course, since matters of criminal law might be very different as compared to the area of asylum, immigration and civil law cooperation. The Court will need to identify a common constitutional thread uniting the AFSJ. Nonetheless, the events of 9/11 and the repercussions of those terrorist attacks continues to cast a well-known shadow over the AFSJ sphere, due to the numerous legislative measures that were adopted in its wake in order to fight terrorism effectively, which did not always guarantee due process rights.¹⁰ The Lisbon Treaty provides for a whole new conglomerate of opportunities with a much more sophisticated framework for analysis and – most importantly – a better way to adopt legal safeguards for the individual, extended jurisdiction of the Court and a legally binding status for the Charter. Hence, the legal toolbox is there; it is just the tools that need developing and refining. Perhaps it is justified to speak of the AFSJ's great potential of transforming from an ugly duckling into the swan of European law. Such a transformation depends, however, on how the EU's human rights record in this area will develop and how the EU can achieve justice.

II. Flexible Integration and Scandinavian Preferences

Whereas the British and Irish managed to secure a 'have the cake and eat it' approach with the possibility of opting out of and then back in to AFSJ matters, the Danes have been more drastic in – what seems at first sight – saying no to the entire project. The development of an AFSJ sphere developed hand in hand with the Schengen project which developed outside the Treaty framework. Denmark was the first Scandinavian state to join the European venture in 1973 with the rest of the Nordic club (Sweden and Finland) joining as late as 1994 (1 January 1995) and Norway staying out of the project due to its negative referenda. Only Finland has accepted the currency of the euro with the Danes getting an official exception,¹¹ while Sweden stays out without any real exception in terms of any granted protocol.¹² Iceland has never had any referenda on the EU Treaty, but it enjoys a special position together with Norway, defined by the European economic area which came

⁸ See e.g. Peers 2012, *supra* note 2, pp. 19-20.

⁹ *Ibid.*

¹⁰ E.g. 2002 The European Arrest Warrant Framework Decision, OJ L 190/1 (2002).

¹¹ 1992 Protocol on Certain Provisions relating to Denmark, annexed to the Treaty establishing the European Community, at:

http://europa.eu/legislation_summaries/economic_and_monetary_affairs/institutional_and_economic_framework/125061_en.htm.

¹² See e.g. F. Snyder, 'EMU – Integration and Differentiation: Metaphor for European Union' in P. Craig & G. de Burca (eds), *The Evolution of EU Law*, Oxford: Oxford University Press 2011, p. 687.

into force in 1993. In addition, both Norway and Iceland have special arrangements with regard to the *Schengen acquis*.¹³

These national preferences are sometimes referred to as national identity and sometimes as ‘flexibility’. It allows Member States a margin of discretion, or flexibility, in complying with the EU rule book by not insisting on the one size fits all model as usually fostered by the programme of harmonisation. Yet the Nordic, or Scandinavian,¹⁴ tradition is very similar, with closely tied legal cultures that started off as a miniature peace project just like the EU itself. After all, Denmark and Sweden are often said to have fought more wars than any other two countries. Today the differences between the Scandinavian countries are mostly visible with regard to the price as well as attitude towards alcohol, Denmark being the most liberal. The Nordic tradition is strong. Not only are the languages almost the same, which the exception of Finland, but so is their legal culture, which emerged through regular Nordic jurist meetings since 1872.¹⁵ Within this fairly homogenous legal culture, the need for flexibility is not as urgent as compared to the European law setting. What then is flexibility when faced with the EU context?

II.1. The Concept of Flexibility Proper

The notion of flexibility or differentiation is generally described as the facilitation or accommodation of a degree of difference between states or regions in relation to what would otherwise be ‘common’ Union rules.¹⁶ Indeed, flexibility as a concept can be found throughout the Treaty and could be said to represent codified pluralism.¹⁷ The EU *acquis* is full of examples of miniature ‘opt outs’ ranging from the Swedish strict approach to alcohol and safeguarding ‘snus’ oral tobacco to more serious abstention of Member States from the euro zone or the Schengen *acquis*.¹⁸ One could further argue that the Treaty-based exceptions to free movement on the grounds of public policy, public health and public security (e.g. Article 36, Treaty of the Functioning of the European Union (TFEU) and Article 52 TFEU) also constitute examples of ‘differentiation’. In the same manner, the Court-centric ‘mandatory requirements’ can be further understood within the context of differentiation vis-à-vis the permissible limits of Member States’ derogations under EU law on the free movement of goods. Moreover, there are examples of differentiation in the context of different levels of harmonisation under the internal market clause of Article 114 (4-5) TFEU. This

¹³ See A. Strandbakken ‘Extradition between Nordic Countries’, in N. Keijzer & E. van Sliedregt, *The European Arrest Warrant*, The Hague: TMC Asser Press 2009, ch 19.

¹⁴ Geographically, the term Scandinavia refers to Sweden, Norway and Denmark, while Finland and Iceland form part of the broader reference to ‘Nordic’. This paper refers to the terms interchangeably, however.

¹⁵ J. O. Sunde, ‘The art of internationalization, or what is Nordic law?’ in J. Husa & K. Nuotio (eds), *Nordic Law – Between Tradition and Dynamism*, Antwerp/Cambridge: Intersentia 2007.

¹⁶ G. de Burca ‘Legal Principles as an Instrument of Differentiation?’ in B. de Witte, D. Hanf and E. Vos (eds) *The Many Faces of Differentiation in EU Law* Antwerp/Cambridge: Intersentia 2003, p. 131.

¹⁷ Discussed further in E. Herlin-Karnell & T. Konstadinides, ‘The Rise and Many Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration’, forthcoming manuscript (on file with the author). On the notion of flexibility see e.g. A. Stubb, ‘A categorization of differentiated Integration’, *Journal of Common Market Studies* 1996-283; D. Curtin, ‘The Constitutional Structure of the Union: A Europe of Bits and Pieces’, *Common Market Law Review*, 1993, 17; B. De Witte, ‘Old-fashioned Flexibility: International Agreements between Member States of the European Union’ in G. de Búrca and J. Scott (eds.), *Constitutional Change in the EU, From Uniformity to flexibility?* Oxford: Hart Publishing 2000, p.31.

¹⁸ On different ‘opt outs’ see e.g. E. Vos, ‘Differentiation, Harmonisation and Governance’ in B. de Witte, D. Hanf and E. Vos (eds) *The Many Faces of Differentiation in EU Law*, Antwerp/Cambridge: Intersentia 2003; and A. Rosas and L. Armati, *EU Constitutional Law* Oxford: Hart Publishing 2012, Ch 7.

flexibility provision provides for derogations relating to the protection of the environment and risk regulation.¹⁹

In any case, ‘flexibility’ has traditionally been defined as the possibility that one or more Member States pursue cooperation outside the scope of certain activities within the Union’s legal framework.²⁰ In short, the notion of enhanced cooperation opens up the possibility of flexibility whereby some Member States can go further towards integration than other, less integrative-minded States. As one Advocate General once expressed it: “*enhanced cooperation is a legal expression of the balancing exercise between making the Union wider and making it deeper*”.²¹ In the context of the visa information system and the Schengen *acquis*, the Court of Justice similarly highlighted this “deepening” aspect and the importance of a multi-speed Europe.²² The Court held that for the coherence of the Schengen *acquis* and the future development of it, Member States are not obliged when they develop and deepen the cooperation between them to provide for special adaptation measures for other Member States that have not yet taken part in any cooperation.²³ Nonetheless, it should however be noted that the Lisbon Treaty stipulates, following the Nice amendments²⁴, that the notion of enhanced cooperation will - to the extent that it takes place within the framework of this Treaty - be open to all Member States at all times.²⁵ Despite the importance of multi-level speed, in the view of the Court, there is no obligation for the Member States in question to provide for adaptation measures (with regard to the Schengen *acquis*). Therefore, it remains an open question just what ‘wider and deeper’ entails.

When discussing the concept of differentiation, the starting point is often the enhanced cooperation mechanisms as the most clear-cut example of flexible integration.²⁶ In short, the classic notion of ‘enhanced cooperation’ means that some Member States go further than other States. The concept accepts that there is room for action outside the EU model and that not all Member States have to be in the same boat, while still respecting each other through the fundamental loyalty principle of the EU. The notion of enhanced or closer cooperation is an expression of flexibility since it offers an alternative model of multi-speed integration. The phenomenon of a ‘two-speed’ Europe is most evidently manifested in the Treaty of Prüm²⁷ and the Schengen *acquis*²⁸, whereby some Member States sought to go further than those less ‘integrative’ Member States by establishing the ‘highest possible’ standard of cooperation. Such cooperation has been taking place especially by means of the exchange of information, particularly in combatting terrorism,

¹⁹ For a recent overview of the different expressions of flexibility in the Lisbon Treaty see E. Herlin-Karnell & T. Konstadinides, *supra* note 16.

²⁰ M. Dougan, ‘The Unfinished Business of Enhanced Cooperation: Some Institutional Questions and their Constitutional Implications’, in A. Ott and E. Vos (eds), *50 Years of European Integration: Foundations and Perspectives*, The Hague, Netherlands: TMC Asser Press 2009, pp. 157-179.

²¹ Case C-77/05 *United Kingdom v. Council* [2007] I-11459 and § 83 of the Opinion of A. G. Trstenjak delivered on 10 July 2007.

²² Dougan 2009, *supra* note 19, pp. 157-179.

²³ *UK and Ireland v Council*, Case C-482/08, judgement of 26 October 2010 not yet reported.

²⁴ T. Konstadinides, *Division of Powers in European Union Law: The Delimitation of Internal Competence between the EU and the Member States*, The Hague: Kluwer Law International 2009, p. 252.

²⁵ 2010 Treaty on the Functioning of the European Union OJ C 326 (2012), Article 328.

²⁶ E.g. S. Weatherill, ‘If I’d wanted you to understand I would have explained it better: What is the Purpose of the provisions on closer co-operation introduced by the Treaty of Amsterdam?’ in D. O’Keeffe and P. Twomey (eds.), *Legal Issues of the Amsterdam Treaty*, Oxford: Hart publishing 1999, p. 21.

²⁷ Convention between Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria, signed in Prüm Germany on 27 May 2005.

²⁸ 1985, The Schengen Agreement. *OJ L 239* (2000).

cross-border crime and illegal migration.²⁹ This sort of cooperation has, in principle, remained outside the scope of the EU Treaty and has therefore been largely excluded from the Court of Justice's jurisdiction. The framework and possibilities of establishing enhanced cooperation have however largely changed through the Lisbon Treaty. The enhanced cooperation mechanism represents a particularly major change in the field of criminal law. Nevertheless it has not been used to date and is closely coupled to the emergency brake mechanism (Articles 82-83, Treaty of the Functioning of the European Union) where a Member State can pull a brake if a criminal law proposal is deemed too sensitive from that national criminal law perspective. In other words, there are good reasons to believe that any future use of the enhanced cooperation within the AFSJ will pose challenges on how to tilt the balance between flexibility and fragmentation while also observing the various Member States opt out/opt ins.

II.2. To Be or not to Be... 'Opting in or Opting out'

The consequence of any opt-out (that is: not participating in a measure) is that the Court of Justice will not have any jurisdiction to monitor the way the Member State in question handles the matter it is opting out of. An opt-out also applies to any international agreement concluded by the Union in relation to the cooperation in question. In other words, an opt-out has serious consequences from the perspective of the EU project.

As indicated above, the UK and Ireland have negotiated a complete smorgasbord approach to the AFSJ project. These Member States have the opportunity to opt out of criminal law cooperation provisions as provided by the Lisbon Treaty and Protocol Number 21. They can later opt in under the conditions set out in the said protocol. Yet in the area of for example the fight against money laundering and financial crime it appears less likely that the UK and Ireland would opt out, given that it is not only the EU which lies behind these initiatives (that is, the international obligations as the guidelines set by the Financial Action Task Force on which the EU Directives are based, compliance 'threat' would remain) and that (at least) the UK has been one of the leading proponents of further cooperation against money laundering across the EU. In addition, the Transitional protocol no. 36 contains specific rules which apply only to the UK and under which the UK must decide by next year (2014) whether it wishes to participate in the remaining third pillar measures at all and whether it accepts the jurisdiction of the Court in this area.³⁰ Needless to say, this is bound to be a political decision and will complicate the legal discussion of the AFSJ.

II.2.1. The Danish Approach: *Vi Siger Nej*³¹

Denmark offers a unique test case for the practicality of the AFSJ project. Protocol no. 22 as attached to the Lisbon Treaty grants Denmark a special position by

²⁹ See generally House of Lords European Union Committee 18th Report of Session 2006 – 07, 2007, 'Prüm: an effective weapon against terrorism and crime?', available at <http://www.publications.parliament.uk/pa/ld200607/ldselect/lducom/90/90.pdf> (accessed 1 June 2011).

³⁰ See J. Piris, *The Lisbon Treaty, A Legal and Political Analysis*, Cambridge: Cambridge University Press 2010, pp. 199-200; as well as P. Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform*, Oxford: Oxford University Press 2010, p. 341.

³¹ Translated from Danish: 'we say no'.

granting it the right to remain outside the project. This protocol means that Denmark participates in Schengen-related measures and Pre-Lisbon third pillar instruments on the basis of international law, which continues to be binding and applicable to Denmark as before, even if these acts are amended. Denmark may however notify the other Member States that it wishes to join the EU criminal law venture. As noted by Suominen, this means that Denmark could decide to opt in to the whole 'thing' unlike the UK and Ireland that need to decide on opting in/or out with respect to each new criminal law measure.³² So Denmark is out unless it 'buys' the entire concept. Likewise, amendments of pre-Lisbon instruments do not apply to Denmark and the old version will continue to apply. Notoriously, ever since the Maastricht Treaty, Denmark has had some serious objections to the EU project. The well-known referendum in connection with the entry into force of the Maastricht Treaty was perhaps the trendsetter to later referenda in France, Netherlands and Ireland. Perhaps it is worth recalling that in accordance with the Danish protocol attached to the previous Amsterdam Treaty, Denmark was exempt from almost all measures adopted within the framework of former title IV of the old EC Treaty. In addition, Denmark had special rules in place regarding the Schengen *acquis*.³³ These rules are now transferred to and bundled together in one document under the regime provided by Lisbon, namely protocol no. 22. When the Lisbon Treaty was being negotiated the Danish government set out to hold a referendum on the Danish opt-outs but such plans were ultimately abandoned.³⁴

In short, the Danish position is as follows. As for AFSJ measures which build upon the Schengen *acquis* and also fall within the scope of Title V of the TFEU, Denmark has six months to decide whether to apply each such measure in its national law.³⁵ Unlike the UK and Ireland it does not have the option to opt back in. According to Article 8 in the Protocol no. 22, Denmark may at any time, in accordance with its constitutional requirements, inform the other Member States that it no longer wishes to avail itself of all or part of this Protocol. In that event, Denmark will apply in full all relevant measures then in force taken within the framework of the EU. Yet Denmark is not participating in any of the criminal law cooperation set out in Article 82-86 TFEU. Denmark is excluded unless the measures in question also build upon the Schengen *acquis*. So the relationship between Denmark and all other Member States in the EU (except the UK and Irish opt-outs) will then be based on intergovernmental cooperation and Council of Europe Treaties such as most prominently the European Convention of Human Rights standards (which will create an interesting situation when the EU accedes to the ECHR, and of course the convention rights are already binding to the EU).

However, interestingly, in connection with the implementation of the European Arrest Warrant (EAW),³⁶ Denmark was praised by the Commission for having implemented the Framework decision in time, in contrast to many other Member States.³⁷ Indeed, studies of the implementation in Denmark revealed that Danish

³² A. Suominen, 'EU criminal law cooperation before and after the Lisbon Treaty – aspects and comments especially in relation to the Norwegian position' *JFT* 2012, pp. 573–604.

³³ Peers 2012, supra note 2; Hinarejos, Spencer and Peers 2012, supra note 2, p. 674.

³⁴ See Report of the Danish institute for international studies, 'The Danish Opt Outs from the European Union: developments since 2000', at Folketing (Danish Parliament) website: http://www.eu-oplysningen.dk/emner_en/forbehold/.

³⁵ Peers 2012, supra note 2; Hinarejos, Spencer and Peers 2012, supra note 2, p. 674.

³⁶ 2002 The European Arrest Warrant Framework Decision, OJ L 190/1.

³⁷ J. Vestergaard & S. Adamo, 'Mutual Recognition in Criminal Matters: The Danish Experience', *Scandinavian Studies in Law* 2009-54, p. 431.

legal practice has supported the operation of this instrument. Against the backdrop of the history of this instrument, and in particular the severe criticism it has received from human rights advocates, this might seem somewhat paradoxical. After all, many national courts have had problems with this instrument, among them the German Federal Constitutional Court. In a nutshell, and to cut a long story short, the EAW was highly controversial when it was adopted in 2002 as it abolished dual criminality for a list of 32 categories of crimes and introduced the concept of mutual recognition in the AFSJ.³⁸ And it still causes controversy in some national legal systems. Therefore it might seem that a change of attitude in Denmark (at least at the political level) with regard to EU criminal law cooperation has occurred. In addition, it appears as if the decision-making process is the most decisive factor for Denmark when considering any cooperation at the EU level.³⁹

Much less controversial then, in the view of the Scandinavians, is the Nordic criminal law sphere.

III. Nordic Criminal Law Cooperation: Denmark is in

The Nordic arrest warrant offers an interesting example of successful criminal law cooperation based on mutual recognition and the notion of trust among the Nordic countries. For example, this instrument goes further than the much-debated EAW in that it completely abolishes dual criminality for all crimes within the Nordic states. Moreover, unlike the EAW, where the maximum punishment prescribes at least 12 months imprisonment in the sentencing scale, there is no such threshold with regard to the Nordic warrant. Consequently, there is also a much higher level of trust within the Nordic sphere as compared to the wider EU area. So far so good, but conceivably there could arrive a time when a Swedish person refuses to be surrendered to Denmark because Denmark is not part of the judicial safeguards adopted under Article 82, Treaty of the Functioning of the European Union. This could for example concern the proposed Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, which would then not be applicable to Swedish suspects facing justice in Denmark.⁴⁰ Be that as it may, the Nordic club has always had very similar criminal law systems and in the near future this might not be a problem. But theoretically, and in any case in the long run it remains highly disturbing that not all the Scandinavian countries are parties to the same legal instrument for the protection of the individual in cross-border criminal law proceedings. And yet the reverse side of the coin is perhaps the most difficult question regarding why the EU should be involved in Nordic criminal law cooperation at all. Yet given the number of third pillar instruments already in place and already part of the Nordic enforcement machinery, it appears to be too late to ask this question. The Scandinavian countries were always proponents of the third pillar regime and saw it as a way of avoiding increased repression in criminal law and less supranational involvement.⁴¹ Indeed, Denmark was the initiative-taker behind the Framework decision on criminal law penalties against environmental damages, the very initiative that encouraged the Commission to take action resulting in the famous case on Environmental crimes where criminal law was moved to the supranational EU.⁴²

³⁸ See e.g. M. Fichera, *The implementation of the European Arrest Warrant in the European Union Law, Policy and Practice*, Antwerp: Intersentia 2011.

³⁹ Suominen 2012, *supra* note 32, pp. 573–604.

⁴⁰ 2001 Proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest COM, 326.

⁴¹ See T. Elholm, 'Does Criminal law Cooperation Necessarily Mean Increased Repression?' *EJCLCJ* 2009, p. 191.

⁴² *Commission v Council* Case C-176/03, judgment 13 September 2005, ECR I-7879.

The relationship between Nordic cooperation and the Danish opt-out to the AFSJ is highly unclear. In particular it remains unclear how the Court of Justice will deal with the situation. In addition, it remains unclear whether the Charter of Fundamental Rights (the Charter) could function as a rebuttal here for Swedish or Finnish nationals being surrendered to Denmark and where, for example and very hypothetically, Denmark was to have a disproportionately high penalty that would breach the rights under Article 49 of the Charter. How will mutual recognition work at all if not all Member states are participating?⁴³ Clearly, it challenges the very point of it.

Another issue worth considering with regard to the protection of Danish citizens is that of Data Protection, which is a Treaty-based right in Article 16 TFEU and Article 8 of the Charter. Data Protection is often at risk in the context of crime fighting. In the Stockholm programme it is repeatedly stressed⁴⁴ that the notion of data protection needs to be strengthened. More specifically, it is stated that the Union must ensure that the fundamental right to data protection is consistently applied and that the Union must therefore respond to the challenge posed by the increasing exchange of citizens' personal data and the need to ensure the protection of privacy. The most important change in this regard is the inclusion of Article 16 TFEU in the Lisbon Treaty. This provision makes it clear that everyone has the right to the protection of personal data. In addition, Declaration 21⁴⁵ states that specific rules on the protection of personal data and the free movement of such data in the fields of judicial cooperation in criminal matters and police cooperation based on Article 16 TFEU may prove necessary in view of the specific nature of these fields. Interestingly, it has been suggested that Article 16 TFEU is drafted in a way that echoes citizenship.⁴⁵ It is true that Framework Decision 2008/977⁴⁶ still applies in this area but it is not as far-reaching as Article 16 TFEU. So even if Denmark is not part of EU criminal law cooperation it still has to safeguard the protection of data. This is therefore an area with an interesting future. The right to data protection, and by extension citizenship rights, need to be balanced against the need to fight crime effectively, as well as against questions of national sovereignty (in Denmark's case). It is also an area where any potential 'opt outs' from legal safeguards will be problematic with regard to due process guarantees and where the reach of the Charter could become the turning point with regard to the general application of fundamental rights beyond title V of the TFEU.

A further issue of importance is the reach of the Charter of Fundamental Rights, which will also still apply to Denmark whether it participates in EU criminal law or not, and which could have a spill-over effect on national law (if there is any EU law aspect that would make Denmark 'implement' EU law). In the recent case of *Stefano Melloni*,⁴⁷ on the validity of the amendments made to the EAW by Framework

⁴³ 2009 The Stockholm programme — An open and secure Europe serving and protecting the citizen, Council of the European Union, p. 10.

⁴⁴ Declaration 21 attached to the Lisbon Treaty.

⁴⁵ See H. Hijmans and A. Scirocco, 'Shortcomings in EU data protection in the third and second pillars: can the Lisbon Treaty help close the gap?', *Common Market Law Review* 2009-46, p. 1485, see also E De Busser (2010) 'Transatlantic Adequacy and a Certain Degree of Perplexity' 1 *Eucrim* 31, E Herlin-Karnell, 'Is the citizen driving the EU's criminal law agenda?' in Dougan, Nic Shuibhne & Spaventa (eds) *Empowerment and Disempowerment of the European Citizen*, Hart publishing, Oxford 2012, ch 9

⁴⁶ 2008/977 Framework Decision, on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters OJ L 350, P. 0060 - 0071.

⁴⁷ Criminal proceedings against *Stefano Melloni*, Case C-399/11, Opinion of AG Bot delivered on 2 October 2012.

Decision 2009/299/JHA,⁴⁸ and addressing the application of the principle of mutual recognition to trial *in absentia*, Advocate General Bot provided an interesting account of the relationship between the EAW and the Charter of Fundamental Rights. The Advocate General focused on Article 53 of the Charter, which provides for the highest relevant human rights standard to be applied. In doing so, he argued that the Charter is not, in any event, a primacy-restricting measure and does not empower the Member States to 'opt out' from EU law. The Court of Justice agreed and held that such an interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law. Specifically, the Court stated that where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.⁴⁹ It could be argued though that Article 53 of the Charter does not hinder the EU in adopting a higher standard.

The interesting question in the present context is what would happen if the European Convention of Human Rights (ECHR) – which Denmark is party to – provides for a higher standard with regard to human rights protection. To find out whether this is the case would require an extensive reading of the case law of the European Court of Human Rights (ECtHR), which is beyond the scope of the present article. Needless to say, the AFSJ is still a work in progress.⁵⁰

Conclusion

This opinion paper has offered an overview of Denmark's complex relationship with the phenomenon of European involvement in the AFSJ field. In doing so the paper has focussed on the meaning of the Danish non-participation in this area. The paper tried to place the Danish 'arrangement' in context by analysing it in the light of the UK and Irish opt-outs. In addition, the paper set out to look at the multifaceted rules on flexibility in order to paint the broader picture of what is actually at stake when discussing the phenomenon of multi-speed Europe.

The EU is like a 'Lego' and Denmark will have difficulties finding the last piece unless it participates fully. Not participating is different from being a proponent of subsidiarity-influenced approaches to EU law or the recognition of national identity as well as pluralistic views.⁵¹ There is always a balance to be struck between flexibility and fragmentation. But these notions are only relevant, as is the establishment of the enhanced cooperation mechanisms, when Member States operate at different speeds in the EU: when they are 'in'. Indeed, Denmark is an old Viking nation famous for its raids from England to Turkey. It is said that during this old Viking era, when the Vikings reached England, the English got off their horses to fight standing while the Vikings rode over them. There were different conceptions of fair play then, long before the concepts of EU harmonisation or conflict of laws were invented. This

⁴⁸ 2009/299 Framework Decision on the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L81/24.

⁴⁹ Criminal proceedings against *Stefano Melloni*, Case C-399/11, judgment of 26 February 2013, § 60.

⁵⁰ E. Herlin-Karnell, 'From Mutual Trust to the Full Effectiveness of EU law: 10 Years of the European Arrest Warrant', *European Law Review*, 2013, -1.

⁵¹ For a very interesting contribution saying the opposite to what this paper is arguing with regard to the desirability of Denmark's non participation in the AFSJ, see R. Adler-Nilsson, 'Opting Out of an Ever Closer Union: The Integration Doxa and the management of Sovereignty', *West European Politics* 2011, p. 1092.

golden period did not last long and the Vikings had to leave. The Danes stopped looking west and turned east and north instead. Scandinavia is now a peaceful club of states and the Nordic cooperation works smoothly. Why do they need the EU for a successful justice and home affairs cooperation? This is something Denmark must ask itself by looking beyond nationalistic slogans.